

NOS. CAAP-15-0000848,
CAAP-15-0000849, CAAP-15-0000850,
CAAP-15-0000852, CAAP-15-0000854, and CAAP-15-0000855

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CAAP-15-0000848

KEITH M. KANESHIRO, in his official capacity as the
Prosecuting Attorney of the City and County of
Honolulu, on behalf of the State of Hawaii,
Petitioner-Appellant, v. ELEVEN (11) PRODUCTS
DIRECT SWEEPSTAKES MACHINES (TOTAL ESTIMATED
VALUE: \$38,500.00), FOUR HUNDRED FIFTY SEVEN
DOLLARS IN UNITED STATES CURRENCY (\$457.00); ONE
(1) CAM SECURITY DIGITAL RECORDING SYSTEM
(ESTMATED VALUE: \$200.00) (TOTAL AGGREGATE
VALUE: \$39,157.00), Defendant-Appellee, and
WINNER'Z ZONE; APRIL WHITING-HARAGUCHI, TRACY
YOSHIMURA, PJY ENTERPRISES; and WENDY WAGNER,
Interested Persons-Appellees
(S.P. NO. 14-1-0567)

AND

CAAP-15-0000849

KEITH M. KANESHIRO, in his official capacity as the
Prosecuting Attorney of the City and County of
Honolulu, on behalf of the State of Hawaii,
Petitioner-Appellant, v. TWELVE (12) PRODUCTS
DIRECT SWEEPSTAKES MACHINES (TOTAL ESTIMATED
VALUE: \$42,000.00), SEVEN HUNDRED FORTY FOUR
DOLLARS IN UNITED STATES CURRENCY (\$744.00); ONE
(1) DVR (ESTMATED VALUE: \$100.00) (TOTAL AGGREGATE
VALUE: \$42,844.00), Defendant-Appellee, and
WINNER'Z ZONE; APRIL WHITING-HARAGUCHI, TRACY
YOSHIMURA, PJY ENTERPRISES; and STEVE OHIRA,
Interested Persons-Appellees
(S.P. NO. 14-1-0568)

AND

CAAP-15-0000850

KEITH M. KANESHIRO, in his official capacity as the Prosecuting Attorney of the City and County of Honolulu, on behalf of the State of Hawai'i, Petitioner-Appellant, v. FIFTEEN (15) PRODUCTS DIRECT SWEEPSTAKES MACHINES (TOTAL ESTIMATED VALUE: \$52,500.00), ONE THOUSAND EIGHT HUNDRED EIGHTY THREE DOLLARS IN UNITED STATES CURRENCY (\$1,883.00) (TOTAL AGGREGATE VALUE: \$54,383.00), Defendant-Appellee, and WINNER'Z ZONE; APRIL WHITING-HARAGUCHI, TRACY YOSHIMURA, PJY ENTERPRISES; and SHERILYN GAMA, Interested Persons-Appellees
(S.P. NO. 14-1-0569)

AND

CAAP-15-0000852

KEITH M. KANESHIRO, in his official capacity as the Prosecuting Attorney of the City and County of Honolulu, on behalf of the State of Hawai'i, Petitioner-Appellant, v. FOURTEEN (14) PRODUCTS DIRECT SWEEPSTAKES MACHINES (TOTAL ESTIMATED VALUE: \$49,000.00), FORTY SEVEN DOLLARS IN UNITED STATES CURRENCY (\$47.00) (TOTAL AGGREGATE VALUE: \$49,047.00), Defendant-Appellee, and WINNER'Z ZONE; APRIL WHITING-HARAGUCHI, TRACY YOSHIMURA, PJY ENTERPRISES; and ANNA MARIE BLAS FEJERAN, Interested Persons-Appellees
(S.P. NO. 14-1-0570)

AND

CAAP-15-0000854

KEITH M. KANESHIRO, in his official capacity as the Prosecuting Attorney of the City and County of Honolulu, on behalf of the State of Hawai'i, Petitioner-Appellant, v. FIFTEEN (15) PRODUCTS DIRECT SWEEPSTAKES MACHINES (TOTAL ESTIMATED VALUE: \$52,500.00), SEVEN HUNDRED SEVENTY NINE DOLLARS IN UNITED STATES CURRENCY (\$779.00) (TOTAL AGGREGATE VALUE: \$53,279.00), Defendant-Appellee, and WINNER'Z ZONE; APRIL WHITING-HARAGUCHI, TRACY YOSHIMURA, PJY ENTERPRISES; and QUYENH NGUYEN, Interested Persons-Appellees
(S.P. NO. 14-1-0571)

AND

CAAP-15-0000855

KEITH M. KANESHIRO, in his official capacity as the Prosecuting Attorney of the City and County of Honolulu, on behalf of the State of Hawai'i, Petitioner-Appellant, v. TEN (10) PRODUCTS DIRECT SWEEPSTAKES MACHINES (TOTAL ESTIMATED

VALUE: \$35,000.00), TWO HUNDRED NINETY DOLLARS IN UNITED STATES CURRENCY (\$290.00) (TOTAL AGGREGATE VALUE: \$35,290.00), Defendant-Appellee, and WINNER'Z ZONE; APRIL WHITING-HARAGUCHI, TRACY YOSHIMURA, PJY ENTERPRISES; and JAY-R LAFORTEZA, Interested Persons-Appellees
(S.P. NO. 14-1-0572)

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

(By: Fujise, Presiding Judge, Leonard and Chan, JJ.)

This is a consolidated appeal from orders disposing of six asset forfeiture cases¹ by the Circuit Court of the First Circuit (Circuit Court).² Petitioner-Appellant Keith M. Kaneshiro, in his capacity as Prosecuting Attorney for the City and County of Honolulu, on behalf of the State of Hawai'i (Prosecuting Attorney), appeals from the following:

(1) The "Findings of Fact, Conclusions of Law, and Order Granting Claimant PJY Enterprises, LLC's [(PJY)] Motion to Dismiss Verified Petition for Forfeiture and/or in the Alternative Granting in Part [PJY's] Motion for Summary Judgment" (Order Granting Motion) entered on April 7, 2015 or April 6, 2015 in each of the six cases in the Circuit Court;

(2) The "Findings of Fact, Conclusions of Law, and Order Denying the State's Motion to Reconsider Findings of Fact, Conclusions of Law and Order Granting Claimant [PJY's] Motion to Dismiss Verified Petition for Forfeiture and/or in the Alternative, Granting in Part [PJY's] Motion for Summary Judgment" (Order Denying Reconsideration) entered in each of the six cases on April 21, 2015; and

(3) The "Final Judgment" (Judgment) entered on

¹ The six cases, numbered S.P. 14-1-0567, 14-1-0568, 14-1-0569, 14-1-0570, 14-1-0571 and 14-1-0572 respectively, were initially assigned appellate numbers CAAP-15-0000848, CAAP-15-0000849, CAAP-15-0000850, CAAP-15-0000852, CAAP-15-0000854, and CAAP-15-0000855 were consolidated into CAAP-15-0000848 by Order of this court on December 29, 2015.

² The Honorable Randal K.O. Lee presided.

October 8, 2015 in each of the six cases.³

On appeal, the Prosecuting Attorney argues that the Circuit Court erred in dismissing its Verified Petition for Forfeiture (Judicial Petition) and/or granting summary judgment in favor of PJY because (1) the Prosecuting Attorney timely commenced its forfeiture proceedings pursuant to Hawaii Revised Statutes (HRS) §§ 712A-7 and -9 (2014); (2) the Judicial Petition did not violate the statute of limitations pursuant to HRS §§ 712A-17 (2014) and 701-108(2) (Supp. 2013); and (3) PJY's due process rights were not violated as a result of the forfeiture proceedings.

BACKGROUND

On September 26, 2012, the Honolulu Police Department (HPD) obtained the "Search Warrant"⁴ authorizing a search of six locations of a business called the Winner'z Zone. The Search Warrant stated:

Affidavit having been made before me by Honolulu Police Department Detective Aaron YOUNG that he has reason to believe that the property described herein may be found at the locations set forth herein and that it falls within those grounds indicated below by "XXX" (s) in that it is property:

XXX obtained in violation of Section 712-1222 and Section 712-1226 of the Hawaii Revised Statutes;

XXX which is, or has been used as a means of committing the offense of Promoting Gambling in the Second Degree in violation of Section 712-1222 of the Hawaii Revised Statutes and Possession of a Gambling Device in violation of Section 712-1226 of the Hawaii Revised Statutes;

XXX possessed or controlled in violation of Section 712-1222 of the Hawaii Revised Statutes and Section 12-1226 of the Hawaii Revised Statutes; and/or

XXX which is evidence of the criminal offenses of Promoting Gambling in the Second Degree in violation of Section 712-1222 and Possession of a Gambling Device in violation of Section 712-1226 of the Hawaii Revised Statutes.

and [] I am satisfied that there is probable cause to believe that the property described herein is contained on or within the premises described below and that the foregoing grounds for application for issuance of the search warrant exists[.]

³ The Honorable Shirley M. Kawamura presided.

⁴ Issued by the Honorable Paul B.K. Wong.

HPD executed the Search Warrant on September 27, 2012. As a result of the September 27 search, HPD recovered a total of seventy-seven "Products Direct Sweepstakes Machines" (gaming machines) from the six Winner'z Zone locations. In the Return of Search Warrant, Detective Aaron Young, who executed the warrant, reported that all of the property taken pursuant to the September 26, 2012 Search Warrant, "will be retained in my custody subject to the order of this court or any court in which the offense in respect to which the property or things taken are triable."

As a result of the September 27, 2012 seizure, on October 12, 2012, PJY, among others, filed a Complaint for Declaratory Judgment, Injunctive Relief and Monetary Damages (2012 Dec Action) against the Prosecuting Attorney and HPD, among others, asking for a ruling that the seized gaming machines were "not in violation of Hawai'i's gambling statutes, specifically Sec. 712-1222 and Sec. 712-1226 of the Hawaii Revised Statutes."

On September 12, 2014, HPD created Incident Reports for Forfeiture (2014 Incident Reports). Each 2014 Incident Report included a Forfeiture Summary which described the events leading up to, and the basis for, forfeiture of the property.

The 2014 Incident Reports also stated that notices of seizure for forfeiture were mailed on September 17, 2014 to, among others, PJY at "their last known addresses."⁵ The notices stated that the gaming machines had "been seized pursuant to Chapter 712A, Forfeiture, Hawaii Revised Statutes" and indicate "SEIZURE DATE: 9/12/2014."

On September 19, 2014, HPD sent requests for forfeiture to the Prosecuting Attorney, asking that "the property described in the accompanying Notice of Seizure for Forfeiture that was seized on 9-12-14 be considered for forfeiture," (HPD Requests for Forfeiture) attaching copies of the 2014 Incident Reports.

⁵ Timely notice was disputed by PJY and the Circuit Court did not resolve this issue in its Order Granting Summary Judgment.

On September 22, 2014,⁶ the Prosecuting Attorney filed six Petitions for Administrative Forfeiture (Administrative Petitions) with the Department of the Attorney General, State of Hawai'i (AG) pursuant to HRS § 712A-10(1) (2014), for the gaming machines and other property seized pursuant to the Search Warrant on September 27, 2012. On November 3, 2014, and in response to the six Administrative Petitions, PJY filed claims for the gaming machines⁷ and requested judicial review of the administrative forfeiture proceedings, pursuant to HRS § 712A-10(9) (2014). The AG created and sent notices of PJY's claims and request to the Prosecuting Attorney on November 6, 2014 by United States Mail.

On December 19, 2014, the Prosecuting Attorney filed in the Circuit Court Verified Petitions for Forfeiture (Judicial Petitions) for the gaming machines in each of the six cases, attaching, *inter alia*, (1) the Notice of Receipt of Claim and In Pauperis Bond dated November 6, 2014; (2) the HPD Requests for Forfeiture; (3) the 2014 Incident Reports; and (4) the notices of seizure for forfeiture. The Judicial Petitions state:

The timeline [(sic)] of the Forfeiture Act has been satisfied as follows:

- a. The subject property was initially seized for forfeiture on or about September 27, 2012 in the City and County of Honolulu, State of Hawaii under [the 2012 HPD Police Report]. Due to time constraints the forfeiture investigation under that report number was cancelled. The subject property was re-seized for forfeiture on or about September 12, 2014 in the City and County of Honolulu, State of Hawaii under [the 2014 HPD Incident Report].

(Emphasis added.)

On January 21, 2015, PJY filed, in each of the six forfeiture cases, "[PJY's] Motion to Dismiss Verified Petition for Forfeiture Filed on December 19, 2014" based on Hawai'i Rules of Civil Procedure (HRCPP) Rules 7, 12(b)(6), and 56 and Rules of the Circuit Courts of the State of Hawai'i Rule 7 (Motions to

⁶ PJY acknowledged this event and date in its Memorandum of Law in support of its Motions to Dismiss/Summary Judgment.

⁷ While in the Administrative Petitions the Prosecuting Attorney sought to forfeit other seized property in addition to the gaming machines, PJY only made claims on the gaming machines. It appears that the Circuit Court granted PJY's Motion to Dismiss/Summary Judgment as to the gaming machines only.

Dismiss/Summary Judgment). PJY requested that the Circuit Court grant summary judgment in its favor if the Circuit Court believed that the matter should be converted from a HRCF Rule 12(b)(6) motion to dismiss to a HRCF Rule 56 motion for summary judgment. PJY maintained that the Prosecuting Attorney failed to comply with the notice requirements of HRS § 712A-7, arguing:

Sec. 712A-7(3), H.R.S., requires the seizing agency to make reasonable efforts to give notice of seizure for forfeiture to all parties known to have an interest in the seized property within twenty days after seizure for forfeiture. The seizure occurred on September 27, 2012 and the notice, which is not in the four corners of the Petition, was not given until September 15, 2014.^[8]

PJY asserted that, Tracy Yoshimura, a member of PJY, claimed to have "never received any such mailing" from HPD. In sum, PJY argued that the HPD's notice of seizure for forfeiture was untimely under either the September 27, 2012 "seizure for forfeiture" date or the September 12, 2014 "seizure for forfeiture" date.

In opposition, the Prosecuting Attorney argued that (1) the gaming machines were not seized for forfeiture until September 12, 2014; (2) HRS §§ 712A-9 and -17 authorized the seizure and reseizure of property; (3) PJY received actual notice from HPD no later than October 12, 2012;⁹ and (4) any

⁸ The Motions to Dismiss/Summary Judgment filed in CAAP-15-0000849, CAAP-15-0000852, and CAAP-15-0000855 maintain that the notices of seizure for forfeiture were not given until "September 16, 2014, at the earliest." The Motion to Dismiss/Summary Judgment filed in CAAP-15-0000850 maintains that the notice of seizure for forfeiture was not given until "September 12, 2014, at the earliest." The Motion to Dismiss/Summary Judgment filed in CAAP-15-0000854 maintains that the notice of seizure for forfeiture was not given until "September 17, 2014, at the earliest." These dates, however, do not coincide with the dates contained in the 2014 Incident Reports attached to the Prosecuting Attorney's Memorandum in Opposition to the Motion to Dismiss/Summary Judgment nor the Declaration of Dean Okinaga, the detective who declared he sent the notices of seizure for forfeiture of the gaming machines to PJY by certified mail at "known addresses" on September 15, 2014.

⁹ In support of the Prosecuting Attorney's claim that PJY received notice that the gaming machines were seized no later than October 12, 2012, the Prosecuting Attorney cites to PJY's 2012 Dec Action filed on October 12, 2012 in the Circuit Court of the First Circuit, wherein PJY acknowledged that the gaming machines were seized on September 27, 2012, pursuant to search warrant, S.W. 2012-238. PJY prayed for, *inter alia*, a declaratory judgment stating that the Prosecuting Attorney's seizure of the gaming machines violated PJY's constitutional rights and that the gaming machines did not violate HRS §§ 712-1222 and -1226.

It appears that this action was subsequently removed to the United
(continued...)

noncompliance with HRS § 712A-7, did not adversely impact PJY. In response, PJY argued *inter alia* that (1) the Prosecuting Attorney violated the clear and unambiguous requirements of HRS § 712A-7; (2) while PJY received notice from HPD that the gaming machines had been seized, they did not receive notice that gaming machines had been seized with the intent to forfeit the property; and (3) whether PJY suffered any adverse effects from the non-compliance with HRS § 712A-7 was not relevant.

The Circuit Court held a consolidated hearing on the Motions to Dismiss/Summary Judgment on March 3, 2015 and March 31, 2015. Based on its determination that the seizure for forfeiture occurred on September 27, 2012, the Circuit Court orally ruled as follows:

With regards to the dismissal, the Court denies the motion to dismiss since 712A-17 of the forfeiture statute sets forth the statute of limitations, and there's been no showing at this point that the statute of limitations have [sic] expired. And that was the same reasoning that was given in United States vs. [James Daniel Good Real Property, 510 U.S. 43 (1993)].

Addressing the defendant's motion for summary judgment, the Court grants partial summary judgment as it relates to the seizure of the machines. Again, the reason why it's partial summary judgment is because there are other materials, such as the money and the camera, that hasn't -- that's still outstanding. But the Court grants the motion for summary judgment with regards to the machines.

On April 6, 2015, the Circuit Court called the parties together to modify this ruling, stating:

In this particular case, the offenses for which the property was subject to forfeiture was Promoting Gambling in the Second Degree, Gambling, and Possession of a Gambling Device. All of them were misdemeanors.

Clearly from the verified petition, the subject -- the subject property was initially seized for forfeiture on September 27, 2012. That being the case, statute of limitations is two years. It should have -- the filing of the petition should have been September 27th, 2014. However, the petition wasn't filed until December 19, 2014.

⁹(...continued)
States District Court for the District of Hawai'i (District Court) in Civil No. 12-00577 LEK-KSC. On March 24, 2017, the Prosecuting Attorney under Hawai'i Rules of Appellate Procedure Rule 28(j), filed with this court a copy of the March 9, 2017 memorandum decision by the United States Court of Appeals for the Ninth Circuit affirming the District Court's grant of summary judgment in favor of, *inter alia*, the Prosecuting Attorney on the issues raised, including whether the gaming machines were gambling devices within the meaning of HRS § 712-1220.

So therefore, the Court in correcting its order is also granting the motion to dismiss because the petition should have been filed by September 27th, not December 19th, 2014.

On April 6, 2015, the Circuit Court reduced its verbal rulings to writing in its Order Granting Motion,¹⁰ concluding:

42. [sic] According to the [Prosecuting Attorney's] pleadings, the police cancelled [2012 HPD Police Report], did not return the seized property to [PJY], did not file any criminal charges, and waited over approximately two (2) years to allegedly "re-seized" the property, under [2014 Incident Report]. The property remained in police custody due to forfeiture "time constraints."

44. The Court finds and concludes that the [Prosecuting Attorney's] argument that HPD "re-seized" the property on September 19, 2014 is disingenuous.

45. Here, the [Prosecuting Attorney's] own Petition admits that HPD actually seized the property on September 27, 2012, that the seizure was for the purposes of forfeiture, and due to time constraints, HPD "cancelled" the [2012 HPD Police Report].

46. Moreover, [the 2014 Incident Report] documenting the seizure states that the seizure occurred on September 27, 2012 at the "Winner'z Zone" . . . , that the seizure was based on probable cause that the criminal offenses of Promoting Gambling in the Second Degree, Gambling, and Possession of a Gambling Device had been committed, and that the property seized was subject to forfeiture pursuant to H.R.S. Chapter 712A.

47. The Court finds and concludes that if it were to follow and uphold the [Prosecuting Attorney's] contention that the seizure for forfeiture had occurred on September 19, 2014, the Court in essence would be validating a falsity and undermining the purpose of H.R.S. Chapter 712A.

48. Therefore, the Court finds and concludes that, the [Prosecuting Attorney] having failed to commence its Verified Petition for Forfeiture within the period in which a criminal proceeding may be instituted for a covered offense pursuant to section 701-108, the Court grants [PJY Enterprises'] Motion to Dismiss.

49. Addressing [PJY's] alternative request for Summary Judgment, the Court grants the Claimant's request for Summary Judgment. Here, the Court finds and concludes that in delaying the commencement of forfeiture proceedings, the [Prosecuting Attorney] violated the [PJY's] Due Process Rights.

(Emphasis omitted.)

The Prosecuting Attorney moved for reconsideration, attaching the declaration of Deputy Prosecutor Kurt Nakamatsu

¹⁰ The Orders Granting Motion in the other five cases were filed on April 7, 2015.

that reiterated the Prosecuting Attorney's characterization of the time line of events, maintained that "[f]orfeiture proceedings commenced on September 22, 2014 when the [Prosecuting Attorney] filed its [Administrative Petition] with the [AG] which is less than two (2) years after any seizure for forfeiture in this case and within the time limitations set forth in HRS § 712A-17[,]" and supported by, *inter alia*, a copy of the respective Administrative Petitions.

PJY opposed the Motions for Reconsideration, arguing that the Prosecuting Attorney's motions should not be considered because they were based on matters previously known. PJY also argued that, even if the Circuit Court considered the Administrative Petitions, the Prosecuting Attorney's forfeiture action was still untimely.

The Circuit Court orally denied the motions, citing to HRS § 712A-10:

I dismissed the verified petition because the verified petition was filed after -- two years after the statute of limitations from the seizure. I didn't dismiss the administrative. But if you look under 712A-10 and if you proceed with a judicial, the judicial proceeding, if any, shall adjudicate all timely filed claims, in which case by me dismissing the judicial proceeding as being violation of 701-108, 712A, subsection 17, at that point, it terminates the administrative proceedings. I mean, that's what 712A-10 says, a judicial proceeding, if any, shall adjudicate all timely filed claims. And that's assuming that this claim, the administrative petition was timely filed.

. . . .

So even if the court were to assume that the administrative petition was filed within the two-year period, the judicial takes care of the administrative.

. . . .

In this particular case, you chose to go administratively, okay. You could have chosen judicially and just foreclosed the attorney generals from even addressing it. But by choosing the administrative forfeiture route, at that point, . . . 712A-10 kicks in, in which case it says that if judicial proceedings is instituted subsequent to the notice of the administrative forfeiture, okay, the judicial proceeding, if any, shall adjudicate all timely filed claims. So at that point, the statute clearly states that the judicial takes precedence over the administrative. So now you cannot come back and say, well, oh, boy, we want to go administrative. You had a choice. You could have proceeded administratively and forgo the judicial, or you could have just gone judicial but file it within the two years. By filing it in December, that's way over the two years.

On April 21, 2015, the Circuit Court reduced its decision to writing, ruling that under HRS §§ 712A-7 and -9, "any administrative or judicial forfeiture proceedings should have been commenced by December 12, 2012[,]" and concluding that the Judicial Petitions "violated the statute of limitation provisions under H.R.S. § 712A-17 and H.R.S. § 701-108(2)." Notably, in its Orders Denying Reconsideration, the Circuit Court also took the opportunity to sua sponte elaborate on the rulings that it made in its Orders Granting Motion, stating not only that the evidence supported the finding that the seizure of the gaming machines occurred on September 27, 2012, but for the first time finding that the seizure was "coupled with an assertion by the seizing agency or by a prosecuting attorney that the property is subject to forfeiture".

The Circuit Court entered its Judgments on October 8, 2015, from which the Prosecuting Attorney timely appealed.

DISCUSSION

A. The Circuit Court Erred in Ruling the Judicial Petitions Were Untimely.

Hawaii's Forfeiture statute provides that a "seizure for forfeiture" triggers a series of events necessary for the forfeiture of property. See generally HRS §§ 712A-7, -9, -10, -11 (2014). A "seizure for forfeiture" is a "seizure of property by a law enforcement officer coupled with an assertion by the seizing agency or by a prosecuting attorney that the property is subject to forfeiture." HRS § 712A-1 (2014).¹¹ Therefore, a "seizure for forfeiture" consists of two parts: (1) the seizure of property by a law enforcement officer and (2) an "assertion" that the property is "subject to forfeiture by the seizing agency¹² or prosecuting attorney."¹³

¹¹ Contrast this definition with that of a "seizure for evidence" which is a "seizure of property by a law enforcement officer." HRS § 712A-1.

¹² HRS § 712A-1 defines "seizing agency" as follows:

"Seizing agency" means any department or agency of this State or its political subdivisions which regularly employs law enforcement officers, and which employed the law enforcement officer who seized property for forfeiture, or such other agency as the seizing agency may designate in a

(continued...)

HRS § 712A-7(3) provides that, following a "seizure for forfeiture," the seizing agency must (1) conduct an inventory and estimate the value of the seized property as soon as practicable, (2) make reasonable efforts to give notice of seizure for forfeiture to interested parties within twenty days, and, under HRS § 712A-7(4), (3) send a written request for forfeiture to the prosecuting attorney within thirty days.¹⁴ The prosecuting attorney then determines whether it is probable that the property is subject to forfeiture, HRS § 712A-9(1),¹⁵ and if so, may initiate forfeiture proceedings by bringing either administrative or judicial proceedings against the property within forty-five days after receiving the seizing agency's written request for forfeiture. Id. Notwithstanding the foregoing, Chapter 712A provides a statute of limitations for forfeiture proceedings, which is equal to the period of limitations for the corresponding

¹²(...continued)
particular case by its chief executive officer or designee.

¹³ HRS § 712A-1 defines "prosecuting attorney" as follows:

"Prosecuting attorney" means the prosecuting attorney or deputy prosecuting attorneys of the various counties, or the attorney general or deputy attorneys general when engaged in the prosecution of a criminal offense.

¹⁴ **§ 712A-7 Power and duties of law enforcement officers and agencies. . . .**

(3) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct an inventory and estimate the value of the property seized. Within twenty days after seizure for forfeiture the seizing agency shall make reasonable efforts to give notice of seizure for forfeiture in the manner provided in section 712A-8(a) or 712A-8(b) to all parties known to have an interest in the seized property.

(4) In the event of a seizure for forfeiture under section 712A-6, the seizing agency shall send to a prosecuting attorney a written request for forfeiture within thirty days, which shall include a statement of facts and circumstances of the seizure, the appraised or estimated value of the property, and a summary of the facts relied on for forfeiture.

¹⁵ **§ 712A-9 Commencement proceedings.** (1) The prosecuting attorney shall determine whether it is probable that the property is subject to forfeiture and, if so, shall initiate administrative or judicial proceedings against the property within forty-five days of receipt of a written request for forfeiture from a seizing agency.

covered offense. HRS § 712A-17 (2014).¹⁶

If the prosecuting attorney decides to pursue administrative forfeiture proceedings against the seized property, the filing, notice, and processing requirements provided in HRS § 712A-10 govern. As pertinent here, the prosecuting attorney must file a petition with the attorney general and make reasonable efforts to serve a copy on all persons known to have an interest in the property; the attorney general gives notice, by publication, of the intent to forfeit the property administratively. HRS 712A-10(1), (2), (3). Persons claiming an interest in the property may file a claim and bond and may request judicial review of the seizure and administrative forfeiture proceedings. HRS § 712A-10(4), (9).¹⁷

¹⁶

§ 712A-17 Limitation of actions. Notwithstanding any other provision of law, forfeiture proceedings under this chapter may be commenced at any time within the period in which a criminal proceeding may be instituted for a covered offense pursuant to section 701-108.

In this case, the Search Warrant identified the offenses under investigation as HRS § 712-1222 (2014), Promoting Gambling in the Second Degree and HRS §712-1226 (2014), Possession of a Gambling Device. Both offenses are misdemeanors, *id.*, and misdemeanors have a two-year limitation period. HRS § 701-108(2)(e).

¹⁷

§ 712A-10 Administrative Forfeiture. . . .

(4) Persons claiming an interest in the property may file either a petition for remission or mitigation of forfeiture, or a claim and cost or in pauperis bond, but not both, with the attorney general, within thirty days of notice by publication or receipt of written notice, whichever is earlier. Notwithstanding section 1-29, the thirty-day time period prescribed herein is computed by excluding the first day and including the last day, unless the last day is a Saturday, Sunday or holiday and then it is also excluded, and the thirty-day time period runs until the end of the next day which is not a Saturday, Sunday or a holiday. "Holiday" includes any day designated as a holiday pursuant to section 8-1.

. . . .

(9) Any person claiming seized property may seek judicial review of the seizure and proposed forfeiture by timely filing with the attorney general a claim and bond to the State in the amount of ten per cent of the estimated value of the property or in the sum of \$2,500, whichever

(continued...)

If the attorney general receives a claim and bond, it must notify the prosecuting attorney who, in his or her discretion, may continue to seek forfeiture by petitioning the circuit court within forty-five days of receipt of the notice. HRS § 712A-10(9). If the prosecuting attorney thereafter institutes judicial forfeiture proceedings, "no duplicate or repetitive notice shall be required" and the judicial proceeding is to "adjudicate all timely filed claims." HRS § 712A-10(10).¹⁸

PJY argued in its Motion to Dismiss/Summary Judgment that the Judicial Petitions should be dismissed "because [Prosecuting Attorney] has not complied with the time limitations under Chapter 712A."¹⁹ The Prosecuting Attorney argued that the

¹⁷(...continued)

is greater, with sureties to be approved by the attorney general, upon condition that if the claimant fails to prove that claimant's interest is exempt from forfeiture under section 712A-5, the claimant shall pay the State's costs and expenses, including reasonable attorneys fees incurred in connection with a judicial proceeding. In lieu of a cost bond, a claimant may file an in pauperis bond sworn on oath before a notary public. An in pauperis bond shall be in the form set out in the appendix to the rules of penal procedure. The claim shall be signed by the claimant and sworn on oath before a notary public and shall comply with the requirements of section 712A-12(5). Upon receipt of the claim and bond, the attorney general shall notify the prosecuting attorney who may discretionarily continue to seek forfeiture by petitioning the circuit court for forfeiture of the property within forty-five days of receipt of notice that a proper claim and bond has been filed. The prosecuting attorney may also elect to honor the claim in which case the prosecuting attorney shall notify the seizing agency and authorize the release of the seizure for forfeiture on the property or on any specified interest in it.

¹⁸ HRS § 712A-10(10) provides, in pertinent part:

(10) If a judicial forfeiture proceeding is instituted subsequent to notice of administrative forfeiture pursuant to paragraph (9), no duplicate or repetitive notice shall be required. The judicial proceeding, if any, shall adjudicate all timely filed claims[.]

¹⁹ While styling its motion as one to dismiss under HRCPC Rule 12(b)(6), PJY also argued, for the same reasons, that summary judgment in its favor was warranted in the event that the Circuit Court decided to treat its motion to dismiss as a motion for summary judgment. The Circuit Court decided the motion under both HRCPC Rule 12(b)(6) and HRCPC Rule 56. However,
(continued...)

gaming machines were initially seized on September 27, 2012, as evidence of criminal charges and re-seized for forfeiture purposes on September 12, 2014, as allowed under HRS 712A-9 and -17. In summary, the Circuit Court found that on September 27, 2012, pursuant to the September 26, 2012 Search Warrant, the gaming machines were seized and, relying on the statements in the 2014 Forfeiture Summaries by HPD and the allegations in the Judicial Petitions by the Prosecuting Attorney that the gaming machines were "initially seized for forfeiture on or about September 27, 2012," concluded there were no genuine issues of material fact, and that PJY was entitled to judgment as a matter of law.

On appeal, an order of summary judgment is reviewed under the same standard applied by the circuit courts. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law. In other words, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Iddings v. Mee-Lee, 82 Hawai'i 1, 5, 919 P.2d 263, 267 (1996) (citation omitted); see also HRCF Rule 56(c).²⁰

¹⁹(...continued)

"[a] Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted shall be treated as a Rule 56, HRCF, motion for summary judgment when 'matters outside the pleading' are presented to and not excluded by the court in making its decision on the motion." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 214, 664 P.2d 745, 749 (1983).

Both PJY and the Prosecuting Attorney presented matters outside the pleadings for the Circuit Court's consideration. As the Circuit Court did not explicitly exclude these documents from consideration in reaching its ruling that the "seizure for forfeiture" occurred on September 27, 2012, it was required to treat PJY's motion as one for summary judgment. See Morioka v. Lee, 134 Hawai'i 114, 334 P.3d 777, No. CAAP-13-0001761, 2014 WL 4251236 at *1 (App. Aug. 27, 2014) (mem.) (holding that "[t]he circuit court was required to treat the [motion to dismiss] as a motion for summary judgment" where the movant attached exhibits to her motion that "were presented to and not excluded by the court in makings its decision on the motion") (brackets omitted); HRCF Rule 12(b).

²⁰ HRCF Rule 56(c) provides, in relevant part:

Rule 56. SUMMARY JUDGMENT.

. . . .

(c) **Motion and proceedings thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings,

(continued...)

Assuming for the purposes of this appeal that the September 27, 2012 seizure triggered the process established in Chapter 712A, these forfeiture proceedings, initiated by the filing of the Administrative Petitions within the limitations period, were timely.

As we have observed, under HRS § 712A-17, the period of limitations was fixed by the time limits for prosecuting the covered offenses in HRS §701-108. The covered offenses here were Promoting Gambling in the Second Degree HRS § 712-1222, and Possession of a Gambling Device, HRS § 712-1226. Both of these offenses are misdemeanors, *id.*, for which prosecution may be brought within two years. Under HRS § 712A-9, Commencement of proceedings, the Prosecuting Attorney had the option to commence forfeiture proceedings by filing administrative or judicial forfeiture petitions. The Prosecuting Attorney opted to file administrative petitions. As it is undisputed that the Administrative Petitions were filed with the AG on September 22, 2014, which was within the two years of the September 27, 2012 seizure, these petitions were timely.

It appears that the Circuit Court interpreted Chapter 712A as requiring a timely filing--i.e., within two years of seizure--of both the Administrative Petitions and the Judicial Petitions, or else requiring that the Prosecuting Attorney opt for one proceeding to the exclusion of the other.²¹ We do not

²⁰(...continued)

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

²¹ The Circuit Court concluded,

75. Finally, nothing prevented the Prosecuting Attorney from filing its [Judicial Petition] by September 27, 2014. Clearly under **H.R.S.** §712A-9, the State [sic] could have proceeded with a judicial forfeiture proceeding. Instead, the Prosecuting Attorney strategically chose to proceed via an Administrative Forfeiture Proceeding.

76. In choosing to proceed via an administrative forfeiture proceeding, the State [sic] cannot now claim that

(continued...)

agree.

Where a prosecuting attorney brings an administrative petition, HRS §712A-9 provides that where, as here, a claimant files a qualifying claim and requests judicial review of an administrative forfeiture petition, upon notice from the AG, the prosecuting attorney may "discretionarily continue to seek forfeiture by petitioning the circuit court for forfeiture of the property," HRS § 712A-10(9) (emphasis added), and if the prosecuting attorney chooses to do so, "no duplicate or repetitive notice shall be required [and the] judicial proceeding, if any, shall adjudicate all timely filed claims." HRS § 712A-10(10). This procedure supports the notion that when an administrative petition becomes contested, the prosecuting attorney may continue the forfeiture process by filing a judicial petition. Under these circumstances, the judicial petition is not a new proceeding, but a continuation of a preexisting one, and bringing the administrative petition within the limitations period satisfies that requirement. Thus, the Circuit Court erred when it ruled the Judicial Petitions were untimely.

Finally, the Circuit Court also found the petitions untimely because they were not filed within the time limits prescribed in HRS §712A-7 and -9. Those provisions require the seizing agency to send a request for forfeiture to the prosecuting attorney within thirty days of seizure and require the prosecuting attorney who determines it is probable that the property is subject to forfeiture to file the petition within forty-five days of the request.

However, neither provision sets penalties for violation of these deadlines. Moreover, to treat them as setting the outer limit for bringing forfeiture actions seems to be inconsistent with the provision that explicitly defines the limitations period. HRS § 712A-17 states that "notwithstanding any other provision of law, the forfeiture proceedings under this chapter

²¹(...continued)

it had forty-five (45) days, after receiving the November 6, 2014 notice, to commence judicial proceedings beyond the two (2) year statute of limitations under H.R.S. §712A-17 and H.R.S. §701-108(2).

may be commenced at any time within the period in which a criminal proceeding may be instituted for a covered offense pursuant to section 701-108." (Emphasis added.) To require the dismissal of a petition which is filed within this limitation period because other internal deadlines are not met would be inconsistent with the clear dictates of HRS § 712A-17.

The Supreme Court in United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993), reached the same result under a similar statutory scheme. There, seizure for forfeiture of real property was instituted four and one-half years after Good was arrested and marijuana was found on the property. Id. at 47. The action was filed within the five-year limitations period, but did not comply with the internal timing requirements of the applicable statute. Id. at 63. The Supreme Court relied on earlier decisions that held if the statute does not specify consequences for noncompliance with statutory timing requirements, the courts would not impose its own coercive sanctions. Id. Consequently, the Court held that "courts may not dismiss a forfeiture action filed within the 5-year statute of limitations for noncompliance with the internal timing requirements of [19 U.S.C.] §§ 1602-1604. The Government filed the action in this case within the 5-year statute of limitations, and that sufficed to make it timely." Id. at 65.

Given the express language enacted by our legislature regarding the timing of forfeiture actions, we agree that the failure to comply with the internal deadlines contained in HRS §712A will not serve as a bar for petition brought within the limitation provision contained in HRS §712A-17.

B. The Circuit Court Erred in Granting Summary Judgment for a Violation of Due Process.

The Prosecuting Attorney also challenges the Circuit Court's decision to grant PJY's alternative motion for summary judgment on due process grounds. The Circuit Court, relying on Good, and the analytical framework in Mathews v. Eldridge, 424 U.S. 319 (1976), ruled against the Prosecuting Attorney as a matter of law, concluding that "the government failed to provide the Court with any 'extraordinary' reasons justifying a

postponement of the forfeiture proceedings and that the private interest of [PJY] outweighs the Government's failure to comply with the timing requirements under H.R.S. Chapter 712A."

Good was a real property forfeiture case where no notice of forfeiture was given to the owners of the property before seizure. In Mathews, a recipient of disability benefits argued that he was entitled to a hearing before an initial termination of benefits prior to review.

Initially, we note that the Mathews factor-analysis requires identification of the interests of the individual and the government. Mathews, 424 U.S. at 333 ("[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."). Such an analysis does not lend itself to an "as a matter of law" determination.

More importantly, the issue in both Good and Mathews was the necessity of pre-deprivation notice and opportunity to be heard, not delay in bringing post-seizure proceedings. Good, 510 U.S. at 46; Mathews, 424 U.S. at 333. In Good, there was a four and one-half year delay between the seizure and the institution of forfeiture proceedings. While the Court considered the delay in the context of the statutory time limitations, it did not rest its due process analysis on this delay. In Mathews, post-deprivation delay was not an issue.

Finally, we note that whatever the interests of the parties in a pre-deprivation notice and hearing procedure--which the Circuit Court did not address--on the undisputed facts in this case, PJY had actual notice that its property had been seized and exercised its options to contest that seizure by bringing the 2012 Dec Action two weeks after the 2012 seizure occurred and in November 2014 when it timely filed its claims against the Administrative Petitions. In the former, PJY was able to assert its defense that the gaming machines were not gambling devices and in the latter, PJY has been able to force contested forfeiture proceedings before the Circuit Court. On these facts, we cannot say that, as a matter of law, PJY was deprived of notice and an opportunity to be heard. See e.g.,

People ex rel. Kelly v. \$16,500 in U.S. Currency, 4 N.E.3D 570
(Ill. App. Ct. 2014).

CONCLUSION

For the foregoing reasons, we vacate and remand the following orders and judgments filed in the Circuit Court of the First Circuit for further proceedings consistent with this opinion:

(1) The "Findings of Fact, Conclusions of Law, and Order Granting Claimant PJY Enterprises, LLC's Motion to Dismiss Verified Petition for Forfeiture and/or in the Alternative Granting in Part PJY Enterprises, LLC's Motion for Summary Judgment" that were entered on April 7, 2015 and on April 6, 2015 in the six underlying cases;

(2) The "Findings of Fact, Conclusions of Law, and Order Denying the State's Motion to Reconsider Findings of Fact, Conclusions of Law and Order Granting Claimant PJY Enterprises, LLC's Motion to Dismiss Verified Petition for Forfeiture and/or In the Alternative, Granting in Part PJY Enterprises, LLC's Motion for Summary Judgment" that were entered on April 21, 2015 in the six underlying cases; and

(3) The "Final Judgment" that was entered on October 8, 2015 in each of the six underlying cases.

DATED: Honolulu, Hawai'i, June 30, 2017.

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Presiding Judge

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Associate Judge

Associate Judge